Harmenderpall Singh a/l Jagara Singh v Public Prosecutor

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO (MT–1) 24–2828 OF 2002
SYED AHMAD HELMY JC
15 SEPTEMBER 2004

Constitutional Law — Fundamental liberties — Equality before the law — Test of reasonable classification founded on intelligible differentiation — Suspension of licence without hearing applicable only to reckless and dangerous driver who had caused death of third party — Whether factum of death of third party was unreasonable classification and had no relation to actual object of statute — Federal Constitution art 8(1) — Road Transport Act 1987 ss 41(5) & 42

Constitutional Law — Fundamental liberties — Right to fair hearing — Suspension of driving licence without hearing — Whether constitutional — Federal Constitution arts 5(1) & 8(1) — Road Transport Act 1987 ss 41(5) & 42

Constitutional Law — Fundamental liberties — Presumption of constitutionality — Burden on him who attacks to show clear transgression of constitutional principles

Constitutional Law — Fundamental liberties — Personal liberty — Whether extends to right to livelihood — Proof of violation must be specific, clear and unambiguous and must contain sufficient particulars — Federal Constitution art 5(1)

Road Traffic — Reckless driving — Causing death — Suspension of licence without hearing — Whether constitutional — Federal Constitution arts 5(1) & 8(1) — Road Transport Act 1987 ss 41(5) & 42

The applicant was charged for causing death by reckless and dangerous driving under s 41(5) of Road Transport Act 1987 ('the RTA'). Pursuant to the section, the magistrate ordered suspension of the applicant's driving licence until the court makes a final decision on the charge. The applicant claimed that s 41(5) of RTA contravened his fundamental rights under arts 5(1) and 8(1) of the Federal Constitution namely, the right to be heard before the suspension of licence and the right to livelihood.

Held, allowing the application with costs:

(1) There is always a presumption in favour of the constitutionality of a particular piece of legislation and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles (see para 7); *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 and *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128 followed. In the light of the presumption of constitutionality the burden invariably rest on the applicant to show that s 41(5) of the RTA was unconstitutional and as it transgressed arts 5(1) and 8(1) of the Federal Constitution (see para 10).

(2) On the issue of violation of art 5(1) of the Federal Constitution, the allegations on which the violation of a constitutional provision is based must be specific, clear and unambiguous and must contain sufficient particulars (see para 11). Thus the applicant's affidavit must condescend to providing specific, clear and unambiguous particulars and basis to support the averment of unconstitutionality of s 41(5) RTA in violation of art 5(1) of the Federal Constitution, which upon a careful perusal, was lacking. In any event art 5(1) confers constitutional protection of life and personal liberty which does not extend to the applicant's right to livelihood (see paras 12 and 13); *Government of Malaysia & Ors v Loh Wai Kong* [1979] 2 MLJ 33 and *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan & another appeal* [2002] 3 MLJ 72 followed.

(3) Article 8(1) of the Federal Constitution does permit reasonable classification if and only if it is founded on intelligible differentiation having a rational relation or nexus with the policy or object sought to be achieved by the statute or statutory provision in question (see para 27); *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128 followed.

(4) The sting of the object or social object sought to be achieved by the Act was to protect third parties against 'risks' (ie all risks) culminating from those who drive recklessly or dangerously (see paras 25, 37 and 38). Section 41(5) discriminates against reckless and dangerous drivers in cases where a third party died by subjecting such drivers to a deprivation of a right to be heard before their licences are suspended. However, such depravation of right to be heard was not applied where the third party was only seriously injured under s 42 (see para 38). The factor which the legislature adopted as constituting the dissimilarity in circumstances between s 41 and s 42 (ie death alone) was purely arbitrary and unreasonable in relation to the social object sought to be achieved by the Act which was to protect third parties from risks and not death alone in the case of reckless and dangerous driving (see para 39). Therefore, it cannot be denied that persons charged under s 42 of the RTA include those who drive recklessly and dangerously and cause serious risk and injury to third parties but these people, who form the very group from which the Act intends to protect third parties, were not discriminated against (see para 40).

(5) This was a classic example of a situation where one class of persons who were similarly situated, namely those who drive dangerously and recklessly, but the applicant being in a category within the class was denied the privilege of being heard, before his licence was suspended because of the factum of death of the third party, whereas those who drive dangerously and recklessly but do not cause death by so doing do not suffer the same fate. This was unreasonable and was of no relation to the actual object sought to be achieved by the RTA. In the circumstances it was the courts' duty to strike down such provision which was discriminatory in nature (see para 43).

[**Bahasa Malaysia summary**

Pemohon dituduh kerana menyebabkan kematian dengan memandu secara melulu dan berbahaya di bawah s 41(5) Akta Jalan Raya 1987 ('AJR'). Berikutan seksyen ini, majistret memerintahkan penggantungan lesen memandu pemohon sehingga mahkamah membuat keputusan muktamad berhubung penuduhan tersebut. Pemohon mendakwa bahawa s 41(5) AJR bercanggah dengan hak asasi beliau di bawah per 5(1) dan 8(1) Perlembagaan Persekutuan terutamanya, hak untuk didengar sebelum penggantungan lesen dan hak pencarian hidup.

Diputuskan, membenarkan permohonan dengan kos:

(1) Sememangnya terdapat andaian untuk berpihak kepada kesahihan perundangan tertentu dari segi perlembagaan dan beban terletak ke atas sesiapa yang terancam untuk membuktikan terdapat perlanggaran yang jelas berkaitan prinsip-prinsip perlembagaan (lihat perenggan 7); *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 dan *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128 diikut. Berdasarkan andaian menurut perlembagaan, beban selalunya terletak atas pemohon untuk menunjukkan bahawa s 41(5) AJR tidak berperlembagaan dan ianya berlanggaran dengan per 5(1) dan 8(1) Perlembagaan Persekutuan (lihat perenggan 10).

(2) Berhubung isu perlanggaran per 5(1) Perlembagaan Persekutuan, dakwaan yang mana perlanggaran suatu peruntukan berperlembagaan diasaskan hendaklah spesifik, jelas dan taksa dan hendaklah mengandungi butiran yang mencukupi (lihat perenggan 11). Oleh itu afidavit pemohon hendaklah memenuhi butiran-butiran spesifik, jelas dan taksa dan mempunyai asas untuk menyokong penegasan tentang ketidak berperlembagaan s 41(5) AJR yang melanggar per 5(1) Perlembagaan Persekutuan, yang setelah diteliti secara rapi, tidak mencukupi. Dalam apa keadaan, per 5(1) memberikan perlindungan nyawa dan kebebasan peribadi menurut perlembagaan yang tidak termasuk hak pemohon untuk pencarian hidup (lihat perenggan 12 dan 13); *Government of Malaysia & Ors v Loh Wai Kong* [1979] 2 MLJ 33 and *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan & another appeal* [2002] 3 MLJ 72 diikut.

(3) Perkara 8(1) Perlembagaan Persekutuan membenarkan pengklasifikasian munasabah jika dan hanya jika didapati berdasarkan 'intelligible differentiation' (perbezaan yang rasional) yang mempunyai kaitan rasional dan hubung kait dengan polisi atau objektif yang ingin dicapai oleh statut atau peruntukan berkanun yang dipersoalkan (lihat perenggan 27); *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128 diikut.

(4) Tujuan utama atau objektif sosial yang ingin dicapai oleh Akta adalah untuk melindungi pihak ketiga daripada 'risiko-risiko' (iaitu semua risiko) yang timbul daripada mereka yang memandu secara melulu dan berbahaya (lihat perenggan 25, 37 dan 38). Seksyen 41(5) diskriminasi terhadap

pemandu-pemandu yang melulu dan berbahaya dalam kes-kes yang mana pihak ketiga meninggal dunia dengan menafikan pemandu sebegini hak untuk didengar sebelum lesen mereka digantung. Namun begitu, penafian hak untuk didengar tidak terpakai jika pihak ketiga hanya cedera teruk dibawah s 42 (lihat perenggan 38). Faktor yang penggubal perundangan ingin gunakan sebagai membentuk ketidaksamaan keadaan antara s 41 dan s 42 (iaitu faktor kematian sahaja) adalah bersifat 'arbitrary' semata-mata dan tidak munasabah berkaitan dengan objektif sosial yang ingin dicapai oleh Akta yang sepatutnya melindungi pihak ketiga daripada risiko-risiko dan bukan kematian sahaja dalam kes memandu secara melulu dan berbahaya (lihat perenggan 39). Oleh itu, tidak boleh dinafikan bahawa mereka yang dituduh di bawah s 42 AJR termasuklah mereka yang memandu secara melulu dan berbahaya dan menyebabkan pihak ketiga mengalami risiko dan kecederaan teruk tetapi mereka ini, yang membentuk kumpulan yang mana Akta berhasrat untuk melindungi pihak ketiga, tidak didiskriminasikan (lihat perenggan 40).

(5) Ini adalah contoh terbaik menunjukkan keadaan di mana sekelas orang yang dalam keadaan yang sama, iaitu mereka yang memandu secara berbahaya dan melulu, tetapi pemohon yang dalam kategori lingkungan kelas ini telah dinafikan hak untuk didengar, sebelum lesennya digantung kerana menyebabkan kematian pihak ketiga, sedangkan mereka yang memandu secara berbahaya dan melulu tetapi tidak menyebabkan kematian tidak mengalami nasib yang sama. Ini tidak munasabah dan tiada kaitan dengan matlamat sebenar yang ingin dicapai oleh AJR. Dalam keadaan sedemikian ia adalah tanggungjawab mahkamah untuk memansuhkan peruntukan seperti ini yang bersifat diskriminasi (lihat perenggan 43).]

Notes

For cases on equality before the law, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1768–1784.

For cases on fundamental liberties generally, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1494–1653.

For cases on personal liberty, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1584–1589.

For cases on reckless driving, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 554–559.

For equality before the law, see 2 *Halsbury's Laws of Malaysia* para [20.175]–[20.176].

Cases referred to

Asiatic Engineering Co v Achhru Ram AIR 1951 All 746 (refd)
Bank of Baroda v R Nagachaya Devi AIR 1989 SC 2105 (refd)
Charanjit Lal Chowdhury v Union of India AIR 1951 SC 41 (refd)

Che Ani bin Itam v Public Prosecutor [1984] 1 MLJ 113 (refd)
Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd [2004] 4 MLJ 259 (refd)
Datuk Haji Harun bin Haji Idris v Public Prosecutor [1977] 2 MLJ 155 (folld)
Government of Malaysia & Ors v Loh Wai Kong [1979] 2 MLJ 33 (folld)
Lindsley v National Carbonic Gas Co (1911) 220 US 61 (refd)
Malaysian Bar & Anor v Government of Malaysia [1987] 2 MLJ 165 (refd)
Ong Ah Chuan v Public Prosecutor [1981] 1 MLJ 64 (refd)
Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan & another appeal [2002] 3 MLJ 72; [2002] 4 CLJ 105 (folld)
Public Prosecutor v Su Liang Yu [1976] 2 MLJ 128 (folld)
Ram Prasad v State of Bihar AIR 1953 SC 215 (refd)
Sagir Ahmad v Government of UP AIR 1954 All 257 (refd)
State of WB v Anwar Ali AIR 1952 SC 75 (refd)

Legislation referred to

Civil Law Act 1956 s 3(1)
Federal Constitution arts 5(1), 8(1)
Pengurusan Danaharta Nasional Berhad Act 1998 ss 3(1), 72
Road Transport Act 1987 ss 32, 41(3), (5), 42

Gobind Singh Deo (Zamri Idrus with him) (Karpal Singh & Co) for the plaintiff.
Alice Loke (Senior Federal Counsel) (Attorney General's Chambers) for the defendant.

Syed Ahmad Helmy JC:

[1] By an originating summons dated 20 December 2002 (encl 2) the applicant seeks the following declaratory reliefs:

(i) a declaration that s 41(5) of the Road Transport Act 1987 ('the RTA') is inconsistent with art 5(1) and art 8(1) of the Federal Constitution; and

(ii) an order that the magistrate's order to suspend the applicant's licence be set aside.

[2] The application was supported by the affidavit of the applicant, Harmenderpall Singh a/l Jagara Singh affirmed on 17 December 2002 (the applicant's affidavit).

[3] In paras 2 and 6 thereof, the applicant averred that he was charged under s 41(5) of RTA before a magistrate in Johor Bahru on 5 December 2002 and that the learned magistrate had ordered suspension of the applicant's driving licence until the court makes a final decision on the charge.

[4] The applicant further avers in para 8 that the provision of s 41(5) of RTA contravenes the applicant's fundamental right as enshrined under art 8(1) of the Federal Constitution namely, the right to be heard before the suspension of licence and the right to livelihood.

[5] Learned counsel for the applicant Mr Gobind Singh Deo in advancing the applicant's case submitted that the provisions of art 8(1) of the Federal Constitution includes and incorporates the fundamental rules of natural justice, namely the rule against bias and the right to be heard — *Che Ani bin Itam v Public Prosecutor* [1984] 1 MLJ 113. It is his contention that in the context of the provisions of s 41(5) of the RTA which makes it mandatory for the magistrate to order suspension of a person's driving licence the very moment he is charged for an offence under the section and the suspension is to remain in force until the conclusion of the trial is unconstitutional and offends art 8(1) Federal Constitution in that not only no discretion is vested in the magistrate but the applicant is not given an opportunity to be heard prior to the making of the suspension order. The unconstitutionality of s 41(5) is further reinforced, it is strenuously argued by learned counsel, by the provisions of s 41(3) and s 32 of the RTA which provides for the suspension of the driving licence upon disqualification. It is his argument that since the effect of disqualification is suspension, to suspend one under s 41(5) of the RTA imposes upon the applicant before trial and conviction that very punishment which he is to face upon conviction under s 41(3) of RTA and hence would lead to the dismal and unconstitutional position of condemning him by punishment before being heard.

[6] Since the provision which the applicant sought to impugn is s 41(5) RTA, it is only appropriate to reproduce same hereunder:

> 41 Causing death by reckless or dangerous driving.
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> (5) Notwithstanding anything in any written law for the time being in force, the court before which a person is charged with an offence under this section shall order the immediate confiscation of the driving licence of that person and shall order the suspension of the licence commencing from the date the charge is first read to that person and such suspension shall have effect:
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> (a) until the court makes a final decision on the charge; and
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> (b) as if the suspension is the suspension referred to in section 32.

[7] It is an established and recognised canon of construction that there is always a presumption in favour of the constitutionality of a particular piece of legislation and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.

[8] In *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155, Suffian LP after summarising the relevant principles that can be deduced from Indian authorities cited in the course of the proceedings stated:

> In considering art 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy.

[9] A further illustration of the applicability of this presumption is the case of *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128 where Hashim Yeop A Sani J said:

> When a law is challenged as offending the guarantee of protection and equal protection of the law … the court ought prima face, to lean in favour of constitutionality and should support the legislation. If it is possible, to do so on any reasonable ground and it is for the party who attacks the validity of the legislation to place all materials before the court to show either the enactment or the exercise of the power under it is arbitrary and unsupportable.

[10] In the light of the presumption of constitutionality the burden invariably rest on the applicant to show that s 41(5) of the RTA is unconstitutional and as it transgresses arts 5(1) and 8(1) of the Federal Constitution and it behooves upon me to determine whether from the evidence adduced and the legal arguments presented the applicant has discharged the burden aforesaid.

[11] On the issue of violation of art 5(1) of the Federal Constitution it is settled law that the allegations on which the violation of a constitutional provision is based must be specific, clear and unambiguous and must contain sufficient particulars (see *Bank of Baroda v R Nagachaya Devi* AIR 1989 SC 2105).

[12] Hence it is imperative that the applicant's affidavit must condescend to providing specific, clear and unambiguous particulars and basis to support the averment of unconstitutionality of s 41(5) RTA in violation of art 5(1) of the Federal Constitution, which upon a careful perusal, I find lacking. In any event art 5(1) confers constitutional protection of life and personal liberty which does not extend to the applicant's right to livelihood. Personal liberty in the constitutional context has been defined by Suffian LP in *Government of Malaysia & Ors v Loh Wai Kong* [1979] 2 MLJ 33 where he stated at p 34:

> Article 5(1) speaks of personal liberty, not of liberty simpliciter … It is well settle that the meaning of words used in any portion of a statute and the same principle applies to a constitution depends on the context in which they are placed, that words used in an Act take their colour from the context in which they appear and that they may be given a wider or more restricted meaning than they ordinarily bear if the context requires it. In the light of this principle, in construing 'personal liberty' in art 5(1) one must look at the other clauses of the article, and in doing so we are convinced that the article only guarantees a person, citizen or otherwise, except any enemy alien, freedom from being 'unlawfully detained'; the right, if he is arrested, to be informed as soon as may be of the grounds of his arrest and to consult and be defended by his own lawyer; the right to be released without undue delay and in any case within 24 hours to be produced before a magistrate; and the right not to be further detained in custody without the magistrate's authority. It will be observed that these are all rights relating to the person or body of the individual, and do not, in our judgment, include the right to travel overseas and to have a passport. Indeed freedom of movement is dealt with specifically in art 9 which, however, only guarantees citizen (but not the non-citizen) the right to enter Malaysia, and, subject to the special immigration laws applying in Sabah and Sarawak

and to other exceptions set out therein, to move freely within the Federation and to reside anywhere therein.

[13] The definition aforesaid was adopted and followed by the Federal Court in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan & another appeal* [2002] 4 CLJ 105 where Mohamed Dzaiddin FCJ stated at p 137:

> We therefore disagree with the Court of Appeal that the word 'personal liberty' should be generously integral part of life itself and those matters which form the quality of life. We are of the view that other matters which go to form the quality of life have been similarly enshrined in Part II of the Constitution under *Fundamental Liberties*…
>
> We agree that the learned State Attorney General that the entry permit only allows the respondent to enter and reside in Sabah, but ipso facto the entry permit does not confer any right to livelihood to the respondent.

[14] Based on the authorities aforesaid and coupled with the applicant's failure to provide specific clear and unambiguous particulars and basis in his affidavit, I have come to the conclusion that the applicant's challenge over the unconstitutionality of s 41(5) in depriving him of his personal liberty in violation of art 5(1) Federal Constitution is without merit.

[15] I shall now turn to address the central issue on whether the right to be heard is a fundamental right guaranteed under art 8(1) of the Federal Constitution and if so, whether s 41(5) of the RTA which denies such a right to be heard is inconsistent with and in violation of art 8(1) of the Federal Constitution.

[16] In determining the issue aforesaid it is pertinent to allude to the decision of our apex court, the Federal Court in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* [2004] 4 MLJ 259, which through a landmark written decision delivered on 27 January 2004 held that the common law right to be heard is not absolute and can be restricted by statute law — the reasoning being premised that the common law which is applicable in Malaysia by virtue of s 3(1) of the Civil Law Act 1956 continues to operate 'save where no provision has been made'.

[17] The Federal Court in construing s 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 held that it had crystallised the common law right. The Federal Court reasoned that as the continued integration of the common law right of access to justice into art 8(1) is dependant on any contrary provision that may be made by any written law as provided by s 3(1) it cannot amount to a guaranteed fundamental right. However though the Federal Court ruled that the access to justice can be accordingly restricted, nevertheless it reaffirms that the restriction must meet the equality protection demands of art 8.

[18] In holding that s 72 of the Danaharta Act can be accommodated by art 8 as it falls squarely within 'reasonable classification' the Federal Court applied and affirmed the doctrine of reasonable classification as propounded by *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155; *Malaysian Bar & Anor v Government of Malaysia* [1987] 2 MLJ 165.

[19] The equality protection through the doctrine of reasonable classification is, I must emphasize the only method of determining whether a law applied alike to all persons who are similarly circumstanced. **A**

[20] The doctrine of classification has been judicially accepted as an integral part of the equal protection clause as decided in the case of *Malaysian Bar & Anor* where Salleh Abas LP at p 166 stated: **B**

> The requirement for equal protection of the law does not mean that all laws passed by a legislative must apply universally to all persons and that the laws so passed cannot create differences as to the persons to when they apply and the territorial limits within which they are in force … Since the legislation can create the differences the question is whether these differences are constitutional. The answer is this, if the basis of the difference has a reasonable connection with the object of the impugned legislation, the difference and therefore the law which contains such provision is constitutional and valid. This is known as the doctrine of classification which has been judicially accepted as an integral part of the equal protection clause. **C** **D**

[21] The manner of ascertaining whether a classification is reasonable or otherwise was succinctly explained by Suffian LP in the celebrated case of *Datuk Haji Harun bin Haji Idris v Public Prosecutor* where at pp 165–166 he stated:

> In India the first question they ask is, is there classification? If there is and subject to other conditions, they uphold the law. If there is no classification, they strike it down. **E**
>
> With respect we would agree with the Solicitor-General's submission that the first question we should ask is, is the law discriminatory, and that the answer should then be — if the law is not discriminatory, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the constitution or is allowed by judicial interpretation, we have to ask the further question, is it allowed? If it is, the law is good, and if it is not, the law is void. **F**
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> In India discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification, using the words used in the passage reproduced above from the judgment in *Shri Ram Krishna Dalmia & Ors v Shri Justice SR Tendolkar & Ors* AIR 1958 SC 538, provided that: **G**
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> (i) the classification is founded on an *intelligible differentia* which distinguished persons that grouped together from others left out of the group; and
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> (ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question. **H**

[22] Where therefore the factor which the legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears a reasonable relation to the social object of the law there will be no violation of art 8(1) **I**

(see *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64). Thus if a law deals equally with all persons of a certain well-defined class it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons, for the class for whom the law has been made is different from other persons and therefore, there is no discrimination amongst equals (see *Charanjit Lal Chowdhury v Union of India* AIR 1951 SC 41). A law would be regarded as discriminatory only if it discriminates one person or class of persons against others similarly situated and denies to the former the privileges that is enjoyed by the latter (see *State of WB v Anwar Ali* AIR 1952 SC 75). As stated in *Lindsley v National Carbonic Gas Co* (1911) 220 US 61 it is only when a law is without any reasonable basis can it be termed as arbitrary.

[23] It must be noted that there is always a presumption that Parliament understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds (see *Ram Prasad v State of Bihar* AIR 1953 SC 215). A court cannot, in the nature of things, be a better judge than Parliament itself in a matter of this kind (see *Asiatic Engineering Co v Achhru Ram* AIR 1951 All 746). Equal protection violations are always examined with the presumption that the state action is reasonable and just, and unless it can be shown that the discrimination that has been resorted to or the power to discriminate that has been given is without reason, it cannot be said that there is unequal treatment (see *Sagir Ahmad v Government of UP* AIR 1954 All 257).

[24] In approaching the question of infringement of art 8 and the application of the two tier test to determine reasonable classification it is imperative that policy underlying the statute which purports to infringe the equality provision and the object intended to be achieved by the statute concerned has to be ascertained — Basu's *Commentary on the Constitution of India* (6th Ed, Vol B) p 171.

[25] The objective of the law is ascertainable from the preamble of the Road Transport Act 1987 which says it is an Act to make provision for, amongst others:

> the protection of third parties against risks arising out of the use of motor vehicles.

[26] Having ascertained the policy and object of the Act the court must now apply the two tier test of whether the provision of s 41(5) of RTA falls under the doctrine of reasonable classification as laid down by Hashim Yeop A Sani J in *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128 at p 133:

> The settled law now is that for the test of permissible classification to be satisfied, two conditions must be fulfilled namely: (1) the classification must be founded on intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (2) that the differentia must have a rational relation to the object sought to be achieved by the statute in question.

[27] Thus it is settled law that art 8(1) of the Federal Constitution does permit reasonable classification if and only if it is founded on intelligible differentiation having a rational relation or nexus with the policy or object sought to be achieved by the statute or statutory provision in question.

[28] Hence the question which has to be asked by the court is:

(i) whether or not the classification is based on an intelligible differentia which distinguishes persons that are grouped together from persons left out of the group; and

(ii) whether the differentia has a rational relation to the object sought to be achieved by the law in question.

[29] In addressing the questions aforesaid it must be reiterated that where the factor which the legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears a reasonable relation to the social object of the law that there will be no violation of art 8(1) (per *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64).

[30] In addressing the first question learned federal counsel Alice Loke submitted that the differentia in s 41(5) is that the mandatory suspension of licence only operates against those charged under the said provision due to the gravity of the offence charged and hence the classification was founded on an intelligible differentia by the legislature to address the particular concern.

[31] On the second question the learned federal counsel submitted that the rational relation between the differentia and the object or nexus sought to be achieved lies in the fact that it is in the public interest or in the legitimate government's ultimate interest that the road is managed and regulated in an orderly manner to ensure safety of road users and their protection from irresponsible drivers causing death by reckless or dangerous driving.

[32] In the context of the RTA it cannot be disputed that the classification of persons who drive recklessly or dangerously are classified into a separate class, for whom provisions are made under s 41 and s 42 of the RTA. As I have already set out the relevant portions of s 41 it is only appropriate for completeness to reproduce s 42 which reads as follows:

42 Reckless and dangerous driving.

(1) Any person who drives a motor vehicle on a road recklessly or at a speed or in a manner which having regard to all the circumstances (including the nature, condition and size of the road and the amount of traffic which is or might be expected to be on the road) is dangerous to the public shall be guilty of an offence and shall on conviction be punished with imprisonment for a term not exceeding five years and to a fine of not less than five thousand ringgit and not more than twenty thousand ringgit.

(2) The court shall order particulars of any conviction under this section to be endorsed on any driving licence held by the person convicted.

(3) A person convicted under this section shall be disqualified from holding or obtaining a driving licence for a period of not less than two years from the date of the conviction and, in the case of a second or subsequent conviction, be disqualified for a period of ten years from the date of the conviction.

(4) Notwithstanding subsection (1), where a person who is a holder of a probationary driving licence is convicted under this section, the court shall thereupon revoke his driving licence.

[33] A close scrutiny of ss 41 and 42 of the RTA would reveal that the only difference between the two sections lies in the factum of death resulting to third parties as a result of such driving.

[34] Under s 41 of the RTA where death arises, sub-s (5) provides for immediate confiscation of the driving licence pending trial whereas such a provision does not appear in s 42 of the RTA.

[35] It follows therefore, in my view that s 41 of the RTA stands to provide for a class of its own and may be regarded as classification in its own right and the question thus arises whether there is intelligible differentia justifying such a classification bearing in mind that the differentia must have a rational relation to the object sought to be achieved by the RTA.

[36] My response would be to answer it in the negative.

[37] To my mind if the purpose or object of the Act, as set out in the preamble is to make provision for the protection of third parties against risks arising out of the use of motor vehicles, then why are those persons accused of careless driving in which serious injuries or even injuries alone/and or occurring to third parties not subjected to suspension pending trial as well?

[38] It is obvious that the sting of the object or social object sought to be achieved by the Act is to protect third parties against 'risks' (ie all risks) culminating from those who drive recklessly or dangerously. What is the rationale then for discriminating against those in whose case (sometimes, if not almost always, unfortunately) a third party dies but not where the third party is seriously injured?

[39] Hence the invariable conclusion that the factor which the legislature adopted as constituting the dissimilarity in circumstances between s 41 and s 42 (ie death alone) becomes purely arbitrary and unreasonable in relation to the social object sought to be achieved by the Act which, as stated above, is to protect third parties from risks and not death alone in the case of reckless and dangerous driving.

[40] It cannot be denied that persons charged under s 42 of the RTA include those who drive recklessly and dangerously and cause serious risk and injury to third parties but unfortunately or rather fortunately these people, who form the very group from which the Act intends to protect third parties, are not

discriminated against and subjected to a depravation of a right to be heard before their licences are suspended.

[41] Surely such a classification cannot be based on intelligible differentia and would offend the equality provision of art 8(1) of the Federal Constitution?

[42] As was stated by Augustine Paul JCA in *Danaharta*'s case at p 42:

> A law would be regarded as discriminatory only if it discriminates one person or class of persons against other similarly situated and denies to the former the privileges that are enjoyed by the latter (see *State of WB v Anwar All* AIR 1952 SC 75).

[43] This reference provides of a classic example of a situation where one class of persons who are similarly situated namely those who drive dangerously and recklessly, but the applicant being in a category within the class is denied the privilege of being heard, before his licence is suspended because of the factum of death of the third party whereas those who drive dangerously and recklessly but do not cause death by so doing do not suffer the same fate. This, to my mind, is unreasonable and is of no relation to the actual object sought to be achieved by the RTA. In the circumstances it is the courts' duty to guard the constitution, jealously if I may add, and strike down such provision which is discriminatory in nature.

[44] As Justice Ajaib Singh said in *Ong Ah Chud*s case: If any particular piece of legislation gives so much as a hint that it violates the constitution, the court must unhesitatingly declare it null and void and of no effect. On the other hand if the impugned legislation is not inconsistent with or does not in any way violate the constitution, it is equally the duty of the court to uphold its validity and give effect to it.

[45] For the foregoing reasons the application herein is allowed with costs.

Application allowed with costs.

Reported by Loo Lai Mee